Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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| In the matter of: | ) | |
| Appropriate Regulatory Treatment for Broadband Access to the Internet of Cable Facilities | ) | CS Docket No. 02-52 |

**INITIAL COMMENTS OF**
**METROPOLITAN GOVERNMENT OF THE CITY OF NASHVILLE AND DAVIDSON COUNTY, TENNESSEE; CITY OF MINNEAPOLIS, MINNESOTA; CITY OF MURFREESBORO, TENNESSEE; NORTH METRO CABLE COMMISSION; NORTH SUBURBAN COMMUNICATIONS COMMISSION; CITY OF OKLAHOMA CITY, OKLAHOMA; RAMSEY/WASHINGTON COUNTIES SUBURBAN CABLE COMMUNICATIONS COMMISSION; CITY OF RIVER FALLS, WISCONSIN; SHERBURNE/WRIGHT COUNTY CABLE COMMUNICATIONS COMMISSION; SOUTH WASHINGTON COUNTY TELECOMMUNICATIONS COMMISSION; QUAD CITIES CABLE COMMUNICATIONS COMMISSION; AND CITY OF URBANDALE, IOWA**

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## SUMMARY

The LFAs filing these Initial Comments collectively represent fifty-five (55) cities and townships, in five different states, served by five different cable providers, and an estimated 70,000 subscribers of cable modem service. The LFAs urge the Commission to recognize that local franchising authorities receive their authority to regulate their rights-of-way from their respective state governments and that the Commission cannot lawfully preempt local control over local public rights-of-way under either the Communications Act of 1934 or under the United States Constitution without just compensation.

Instead of attempting to preempt local authority, the Commission should work with state and local government in creating regulatory certainty by implementing a dual regulatory structure, similar to Title VI, which has benefited the companies, the local franchising authorities, and the subscriber. From the late 1990s through today, under the dual regulatory scheme initiated by the Commission in 1972 and later codified in the Cable Act of 1984, the cable industry has become the national leader in the provision of high speed Internet Service through its cable modem service. It is estimated that in just two years, Internet access through broadband is expected to grow another 40.3%.

Regulatory certainty has also benefited local governments through the collection of franchise fees and compensation for the use of public rights-of-way. The LFAs estimate that they will collectively lose $1,800,000.00 this year, and over the next two years it is reasonable for the LFAs to estimate that they will collectively lose $2,525,400.00 per year in franchise fees. In all likelihood the LFAs are likely to lose in excess of $50,000,000.00 over the course of a fifteen-year franchise.

Subscribers have benefited from the rapid roll out and availability of cable modem services. They also benefited from having local government maintain regulatory authority over cable modem service in the form of customer service standards, the local handling of customer complaints and the possible ability to regulate rates on cable modem service. While it was clear that the dual regulatory scheme under Title VI helped to some extent to hold cable companies accountable for rate increases, the Declaratory Ruling releasing cable modem services to a virtual unregulated environment immediately produced astonishing cable modem service rate increases. It is not mere coincidence, for example, that shortly after the Commission's Declaratory Ruling, AT&T Broadband announced that it will increase cable modem service rates $7.00 (approximately 18%), including by increasing rates on subscribers that own cable modems in a disproportionate amount as contrasted to subscribers that rent cable modems from AT&T Broadband. If cable modem service fees continue to escalate at this pace it will create a national environment of technological "haves and have nots."

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## I. INTRODUCTION

These Comments are submitted in response to the Commission's above-captioned Notice of Proposed Rulemaking, on behalf of the following local franchising authorities: the Metropolitan Government of the City of Nashville and Davidson County, Tennessee; the City of Minneapolis, Minnesota; the City of Murfreesboro, Tennessee; the North Metro Telecommunications Commission (a joint powers commission consisting of the cities of Blaine, Centerville, Circle Pines, Ham Lake, Lexington, Lino Lakes and Spring Lake Park, Minnesota); the North Suburban Communications Commission (a joint powers commission consisting of the

cities of Arden Hills, Falcon Heights, Lauderdale, Little Canada, Mounds View, New Brighton, North Oaks, Roseville, St. Anthony, and Shoreview, Minnesota); the City of Oklahoma City, Oklahoma; the Ramsey/Washington Counties Suburban Cable Communications Commission (a joint powers commission consisting of the cities of Birchwood, Dellwood, Grant, Lake Elmo, Mahtomedi, Maplewood, North St. Paul, Oakdale, Vadnais Heights, White Bear Lake, and Willernie, Minnesota, and the Township of White Bear Lake, Minnesota); the City of River Falls, Wisconsin; the Sherburne/Wright County Cable Communications Commission (a joint powers commission consisting of the cities of Big Lake, Buffalo, Cokato, Dassel, Delano, Elk River, Maple Lake, Monticello, Rockford and Watertown, Minnesota); the South Washington County Telecommunications Commission (a joint powers commission consisting of the cities of Cottage Grove, Grey Cloud Island, Newport, St. Paul Park, and Woodbury, Minnesota, and the Township of Denmark, Minnesota); the Quad Cities Cable Communications Commission (a joint powers commission consisting of the cities of Anoka, Champlin, Ramsey and Andover, Minnesota); and the City of Urbandale, Iowa (collectively the "LFAs"). The LFAs collectively represent fifty-five (55) cities and townships, in five different states, and are served by five different cable providers providing cable modem service to approximately 70,000 subscribers.[1]

[1] The LFAs can only estimate the actual number of cable modem service subscribers because the various cable modem service providers refuse to give the LFAs adequate data. The Metropolitan Government of the City of Nashville and Davidson County estimates 25,000 cable modem subscribers; the City of Oklahoma City estimates 16,000 subscribers; the City of Minneapolis estimates 7,700; the City of River Falls estimates 1,000 subscribers; the Ramsey/Washington Counties Suburban Cable Communications Commission estimates 5,310 subscribers; the North Suburban Communications Commission estimates 5,000 subscribers; the City of Murfreesboro estimates 4,400 subscribers; the Quad Cities Cable Communications Commission estimates 1,500 subscribers; the South Washington County Telecommunications Commission estimates 5,400 subscribers; the City of Urbandale, Iowa estimates 1,845 subscribers; and the North Metro Cable Commission estimates 800 subscribers of one-way cable modem service.

These Comments submitted on behalf of the LFAs will address paragraphs 98, 99, 101-108 and 111-112 of the Federal Communications Commission's Notice of Proposed Rule Making ("NPRM")[2]. While the LFAs believe that cable modem services should be properly classified as "cable services," subject to Title VI of the Communications Act of 1934, we recognize that the Federal Communications Commission (the "Commission") has issued a Declaratory Ruling[3] in which it concluded that cable modem service is an interstate information service. Although the Commission's Declaratory Ruling has been appealed and will be heard in the Ninth Circuit,[4] we will assume that cable modem service is an interstate information service for the purpose of our Comments.

As discussed in greater detail below, the LFAs believe that local franchising authorities receive their authority to regulate the use of their rights-of-way from state and local law. Any attempt to preempt this authority would be impermissible under the Communications Act and constitute an unconstitutional taking under the Fifth Amendment to the United States Constitution. The Commission, using the Cable Communications Policy Act of 1984, as amended (the "Act") as a model, should adopt a dual regulatory policy that governs cable modem service, the same dual regulatory scheme that created regulatory certainty for cable operators and led to the rise of cable modem service as being the dominant high-speed gateway to the Internet.

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[2] *See FCC Declaratory Ruling and Notice of Proposed Rulemaking*, GN Docket No. 00-185, CS Docket No. 02-77 (Released March 15, 2002).

[3] *Id.*

[4] *See National League of Cities v. FCC*, Court of Appeals Docket #: 02-71425 (9th Cir. 2002).

## II. THE COMMISSION DOES NOT HAVE AUTHORITY TO PREEMPT LOCAL GOVERNMENT AUTHORITY TO REQUIRE FRANCHISES AND TO COLLECT FRANCHISE FEES FROM ANY INFORMAION SERVICE PROVIDER THAT OCCUPIES MUNICIPAL PUBLIC RIGHTS-OF-WAY.

There is a misconception that has "grown to almost a mythical proportion" that federal regulatory oversight over the communications area has negated the need for authority of state and local governments to require franchises or other authorizations under existing applicable state or local law for the use of public property.[5] We take exception to the Commission's statements in paragraphs 102 and 108 of the Declaratory Ruling that Sections 621 and 632 of the Cable Act are the source of local franchising authority. This is a plain misstatement of the law. Neither of these provisions confers any authority upon local franchising authorities, but rather preserves pre-existing local government authority against preemption.[6] Local governments derive authority to franchise entities that occupy public rights-of-way from state law, not federal law, since cities are wholly creatures of state law.[7] More specifically, local governments generally receive their regulatory authority over their rights-of-way from either their respective

[5] *See* Clarence A. West, *The Information Highway Must Pay Its Way Through Cities: A Discussion of the Authority of State and Local Governments to be Compensated for the Use of Public Right-of-Way*, 1 Mich. Telecom. Tech. L. Rev. 29 (1995).
[6] *See City of Dallas v. FCC,* 165 F.3d 341, 347 (5th Cir. 1999).
[7] *See* Clarence A. West, *The Information Highway Must Pay Its Way Through Cities: A Discussion of the Authority of State and Local Governments to be Compensated for the Use of Public Right-of-Way*, 1 Mich. Telecom. Tech. L. Rev. 29, 34 (1995); and 10A Eugene McQuillin et al., The Law of Municipal Corporations 30.39.10 (3d ed. 1990).

state constitution or statutes[8]. This authority has been consistently upheld by the United States Supreme Court.[9]

While local franchising authorities receive their power to franchise and manage public rights-of-way from their respective state governments, the Commission does have the power, albeit very limited, under Section 1 of the Communications Act to preempt state and local law.[10] In order to completely preempt state law, the Commission has the burden of proving that it is acting within its scope of authority and that the subject matter is impossible to separate between federal and state regulators and that local regulation would negate a valid goal of the Commission.[11] The regulation of cable modem services is clearly jurisdictionally mixed, meaning there are local and national jurisdictional interests. It is also clear, as shown below, that cable modem service has thrived under the dual regulatory structure of Title VI. History has shown that shared jurisdiction over cable modem services can be easily accomplished and that local regulation has not frustrated or threatened in the least the Commission's goals concerning cable modem service. In fact, under the dual regulatory structure of Title VI, cable modem service has grown in past years at a rate of over 100%.[12] Therefore, the Commission cannot

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[8] *See* Clarence A. West, *The Information Highway Must Pay Its Way Through Cities: A Discussion of the Authority of State and Local Governments to be Compensated for the Use of Public Right-of-Way*, 1 Mich. Telecom. Tech. L. Rev. 29, 30 (1995); and 10A Eugene McQuillan et al., *The Law of Municipal Corporations* 30.39.10 (3d ed. 1990).

[9] *See, e.g., St. Louis v. Western Union Tel. Co*., 148 U.S. 92 (1893); *Postal Tel. Cable Co. v. City of Newport*, 76 S.W. 159, 160 (Ky. 1903); and *Western Union Tel. Co. v. City of Richmond*, 224 U.S. 160 (1912); *Postal Tel.-Cable Co. v. City of Richmond*, 249 U.S. 252 (1919).

[10] *See* 47 U.S.C. §§ 151 and 152; *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986); *California v. FCC*, 39 F.3d 919 (9th Cir. 1994).

[11] *See Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355 (1986); *California v. FCC*, 39 F.3d 919 (9th Cir. 1994). For a discussion on the Commission's preemption powers *see* Michael J. Zpevak, *FCC Preemption After Louisiana PSC*, 45 Fed. Comm. L.J. 185 (April, 1993).

[12] *See* Section III *infra*.

prove it impossible to jointly regulate cable modem service, and it certainly cannot prove, given the recent history of unprecedented growth, that local franchising authorities will negate any goals of the Commission.

Sections 624(a) and (b)[13] of the Cable Act, which are also cited in the NPRM, do not provide any preemptive authority to the Commission over local government authority to manage interstate information service providers' use of public rights-of-way and to require compensation for such use. Sections 624(a) and (b) state:

> (a) Any franchising authority may not regulate the services, facilities, and equipment provided by a cable operator except to the extent consistent with this title.
>
> (b) In the case of any franchise granted after the effective date of this title, the franchising authority, to the extent related to the establishment or operation of a cable system -
> (1) *in its request for proposals for a franchise* (including requests for renewal proposals subject to section 626), may establish requirements for facilities and equipment, but may not, except as provided in subsection (h), establish requirements for video programming or other information services …

(Emphasis added.) Section 624 actually affirms local authority to regulate non-cable services. Section 624(b) has been consistently interpreted only to prevent local franchising authorities from including in a request for proposals or a request for a renewal proposal a requirement for specific or general types of services. However, the same section goes on to make it clear that local franchising authorities can enforce service requirements for broad categories of cable services and other services, including information services and any other type of communications service, that are included in a franchise.[14] The Cable Act limits local

[13] 47 U.S.C. § 544(a) and (b).
[14] *See* 47 U.S.C. § 544; *see New York v. FCC,* 814 F.2d 720, *aff'd* 486 U.S. 57 (1988).

franchising authorities to demand the provision of information services, such as cable modem service, but it allows the local franchising authority to enforce service requirements to which an operator agrees or which an operator proposes as part of a franchise proposal. There are also numerous provisions in the dual regulatory provisions of Title VI that permit local regulation of information services.[15] Further, the Commission, by declaring cable modem services to be Information Services under Title I, caused cable modem service to be subject to regulation under both Titles I and VI.

Any attempt to preempt lawful local government control of public rights-of-way would constitute an unconstitutional taking under the Fifth and Tenth Amendments of the United States Constitution. This principle goes back to the Telegraph Act of 1866. For example, in *Postal Tel. Cable Co. v. City of Newport*, the Kentucky Court of Appeals, citing several United States Supreme Court cases held:

> The Congress of the United States has no power to take private property for public purposes without compensation, and it can no more take the property of a state or one of its municipalities than the property of an individual. The acts of Congress … conferred on the [telecommunications company] no right to use the streets and alleys of the city … which belonged to the municipality.[16]

In the same vein, the United States Supreme Court has consistently held that local public rights-of-way cannot be given away to communications companies by Congress without reasonable

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[15] *See, e.g.,* 47 U.S.C. §§ 541(d)(1), 542(h), 543(a), 544(b)(1), 544(b)(2), 540(c)(1)(B), 551, 552, 554, and 556(a) and (b).

[16] *See Postal Tel. Cable Co. v. City of Newport*, 76 S.W. 159, 160 (Ky. 1903) (*citing St. Louis v. Western Union Tel. Co*., 148 U.S. 92 (1893) and *Postal Tel. Co. v. Baltimore*, 156 U.S. 210 (1895)). *See also* Clarence A. West, *The Information Highway Must Pay Its Way Through Cities: A Discussion of the Authority of State and Local Governments to be Compensated for the Use of Public Rights-of-Way*, 1 Mich. Telecomm. Tech L. Rev. 29 (1995).

compensation for the use of the local public rights-of-way.[17] For instance, in *St. Louis v. Western Union Tel. Co.* the court rejected Western Union's claim that a City could not impose a pole charge on its use of the local rights-of-way, in light of the Telegraph Act of 1866,[18] which granted rights to telegraph companies to use federal post roads for interstate telegraph operations and prohibited states and local governments from interfering with those operations.[19] In so doing, the Court held that the 1866 Telegraph Act did not grant an "unrestricted right to appropriate the public property of a state.[20] Accordingly, the Federal government did not have the power to "dispossess the State of such control and use, or appropriate the same to its own benefit, or the benefit of any corporations or grantees, without suitable compensation to the State. This rule extends to streets and highways; they are public property of the state."[21]

In *Western Union Tel. Co. v. City of Richmond*, Justice Holmes held the Telegraph Act of 1866 was "only permissive, not a source of postitive rights…[The statute] gives the appellant [the telegraph company] no right to use the soil of the streets…"[22] Finally, in *Postal Tel.-Cable Co. v. City Richmond*, the last significant Supreme Court Case addressing the Telegraph Act of 1866 and local authority to receive compensation, the Supreme Court succinctly held that "even interstate business must pay its way – in this case for its right-of-way and the expense incident to the use of it."[23]

This line of cases illustrates that there is over one hundred years of legal precedent

[17] *St. Louis v. Western Union Tel. Co*., 148 U.S. 92 (1893).
[18] 148 U.S. 92 (1893).
[19] 14 Stat. 221 (1866).
[20] *St. Louis v. Western Union Tel. Co*., 148 U.S. 92, 100 (1893).
[21] *St. Louis v. Western Union Tel. Co*., 148 U.S. 92, 100-01 (1893).
[22] *Western Union Tel. Co. v. City of Richmond,* 224 U.S. 160, 169 (1912).
[23] 249 U.S. 252, 259 (1919).

holding that the federal government cannot take local public rights-of-way without just compensation and that communications companies must pay for their use of public property for private profit. Any attempt by the Commission to preempt local control over their rights-of-way in the instant rulemaking would not only be unlawful under the Communications Act, but it would also be an unconstitutional taking under the United States Constitution.

Last, but not least, we note that the Internet Tax Freedom Act does not prohibit the ability of local franchising authorities to impose fees for the private use of public rights-of-way. The fees that local franchising authorities collect for use of public rights-of-way for private profit have been consistently held to be in the nature of fees rather than taxes.[24]

## III. THE LONG-STANDING DUAL REGULATORY SCHEME GOVERNING CABLE SERVICE CREATED REGULATORY CERTAINTY AND LED TO THE GENESIS AND ADVANCEMENT OF CABLE MODEM SERVICES.

The dual regulatory structure of Title VI should be carried over to the regulation of cable modem services. Over thirty years ago, the Commission asserted ancillary jurisdiction over and adopted rules for cable systems.[25] These initial rules focused upon the delivery of local TV stations and distant broadcast signals to cable television subscribers. In 1972, following a Supreme Court decision affirming the Commission's jurisdiction over cable television,[26] the Commission adopted new rules, in which the Commission created a "deliberately structured

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[24] *See e.g. Qwest v. City of Berkley*, 146 F. Supp.2d 1081, 1093 (N.D. CA 2001); *City of Dallas v. FCC*, 118 F.3d 393, 397-98 (5th Cir. 1997); *AT&T Communications of Southwest, Inc. v. City of Austin*, 42 F. Supp.2d 708, 711 (S.D. Tex. 1998).

[25] *CATV and Community Antenna Systems*, 2 F.C.C.2d 725, 6 R.R.2d 1717 (1966).

[26] *See United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968) (the authority of the Commission is "reasonably ancillary to the effective performance of the Commission's various responsibilities…").

dualism."[27] This dual regulatory policy adopted by the Commission distinguished between matters of national concern, such as signal carriage, and matters of local concern involving basic issues of the type and quality of service needed in a community.[28] The 1972 rules required cable system operators to obtain franchises from local governments and meet certain minimum standards.[29] Local governments were restricted from collecting a franchise fee greater than three percent (3%), or, upon petition to the FCC with sufficient justification, up to five percent (5%), while local governments were charged with handling franchise administration and complaints related to such things as billing, service and other concerns.[30]

Over the next ten years, the Commission refined its rules on cable television, commencing with the Clarification of the Cable Television Rules.[31] Then, in 1984, Congress passed the Cable Act, which purported to "establish a national policy that clarifies the current system of local, state and Federal regulation of cable television,"[32] and essentially accepted the Commission's 1972 policies as the basis for dual federal-state and/or local regulation.[33] As the preamble states, the states and local governments are charged with the important choices of who, what, where and how cable service should be delivered, while the Commission is charged with

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[27] *Cable Television Report and Order*, 36 F.C.C.2d 143, 207, 24 R.R.2d 1501 (1972), *modified on recon*., 36 F.C.C.2d 326 (1972).
[28] *See* Stephen R. Ross, *The Cable Act of 1984 – How Did We Get There and Where are We Going?*, 39 Fed. Comm. L.J. 27, 31 (May 1987).
[29] *Id.* at 31; *see* former section 76.31 of the Commission's rules, which were later reduced to guidelines and then eliminated by the Cable Act in 1984.
[30] The Cable Act of 1984 later eliminated the petition requirement and increased the franchise fee cap to 5% of gross revenues.
[31] 46 F.C.C.2d 175, 29 R.R.2d 1621 (1974).
[32] H.R. Rep. No. 934, 98th Cong., 2d Sess. 19 (1984).
[33] *See* Stephen R. Ross, *The Cable Act of 1984 – How Did We Get There and Where are We Going?*, 39 Fed. Comm. L.J. 27, 36 (May 1987).

developing a national and uniform telecommunications policy.[34] Since 1966, the Commission and state and local government have had concurrent jurisdiction over cable system operators.

The Commission's Declaratory Ruling reverses over 35 years of an established and successful regulatory policy. While the Commission's Declaratory Ruling declaring cable modem services to be Information Services does not change state and local government authority over private companies desiring to be in public rights-of-way for private profit, it arbitrarily removes cable modem service from this long standing policy. The Declaratory Ruling ignores that cable modem service is still delivered by these same locally franchised private companies over the same franchised infrastructure which occupies locally managed and controlled public rights-of-way. As shown above, the Commission has no basis to preempt local franchising authorities from regulating cable modem service. Instead, the Commission should work with state and local government in creating a dual regulatory structure, similar to Title VI.

Until the Commission's Declaratory Ruling, cable modem service had been considered a cable service by local governments and in most instances the cable companies. Throughout the late 1990s through today, under the dual regulatory scheme initiated by the Commission and later codified in the Cable Act, the cable industry has become the national leader in the provision of high-speed Internet Service through its cable modem service. According to the Commission's Report on Competition,[35] cable system operators have millions more subscribers than any other medium providing high-speed Internet service. It is estimated that as of year end 2001, cable

[34] *Id.*; s*ee also,* 47 U.S.C. § 521.
[35] *See Eighth Annual Report – Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,* ¶ 44, CS Docket No. 01-129, FCC 01-389 (Rel. January 14, 2002).

modem service was available to over 81 million homes with more than 7.2 million subscribers.[36] The companies that serve the LFAs have a cable modem service penetration rate ranging from 14.2% to 7% of their basic cable subscribership.[37] Overall, cable system operators pass more homes and have more subscribers of high-speed Internet service than satellite service providers and competitive local exchange carriers combined. It is estimated that high-speed Internet service will increase 40.3% over the next two years[38].

Clearly, under the dual regulatory model of federal and state/local regulation that was in place until the Declaratory Ruling was issued, cable modem service has thrived. Indeed, a recent subscriber survey showed that future Internet subscribers were five times more likely to subscribe to cable modem service than to DSL service (the closest competitor to cable modem service).[39] In fact, in just two years, Internet access through broadband is expected to grow from 15.4% to 55.7%, a growth of 40.3%,[40] which is a conservative estimate[41] given that broadband

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[36] *See Eighth Annual Report on the Status of Competition in the Market for the Delivery of Video Programming*, ¶ 44, CS Docket No. 01-129, FCC 01-389 (Rel. January 14, 2002).

[37] *See* Kagan, K Book, *The Guide to Broadband Stats and Standings,* at 14 (Spring/Summer 2002). Cox Communications has 62,379,000 basic subscribers, including 8,836,000 cable modem service subscribers - a 14.2% penetration rate; Comcast Communications has 84,711,000 basic subscribers, including 9,481,000 cable modem service subscribers - an 11.2% penetration rate; AT&T Broadband has 135,601,000 basic subscribers, including 15,120,000 cable modem service subscribers - an 11.2% penetration rate; Charter Communications has 69,537,000 basic subscribers, including 6,077,000 cable modem service subscribers – an 8.7% penetration rate; and Mediacom has 15,950,000 basic subscribers, including 1,123,000 cable modem service subscribers - a 7% penetration rate.

[38] *See Eighth Annual Report – Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming,*¶ 43, CS Docket No. 01-129, FCC 01-389 (Rel. January 14, 2002).

[39] *See* NCTA Blue Book 2002, at 14A, May 2002.

[40] *See Eighth Annual Report on the Status of Competition in the Market for the Delivery of Video Programming*, ¶ 43, CS Docket No. 01-129, FCC 01-389 (Rel. January 14, 2002).

[41] In the City of Murfreesboro, the cable operator projected a 66% increase between 2000 and 2002.

Internet access jumped 148% among home Internet users from December 1999-2000[42] and 90% in 2001.[43] In fact, cable providers themselves have seemed to prefer this regulatory model, as evidenced by the fact that all of the cable operators serving the LFAs voluntarily agreed that cable modem service was subject to Title VI.

The main reason for local governments being involved in the regulation of any wireline communications service is the fact that local governments own valuable property that communications companies want and need to use to maximize their private profit. The public rights-of-way are the most cost effective way for communications providers to deliver their services. If companies had to acquire property through easements or direct purchase, there is no question that cable modem service would be immediately economically infeasible. The same infeasibility would exist if such private companies had to compensate local or state governments for the actual value of the public property they occupy to deliver cable modem service. The Commission's Declaratory Ruling must be called what it is: a free ride for providers of cable modem service to increase their income at the expense of the public and local and state governments.

For years, cable system operators and local governments have agreed nearly unanimously that cable modem services should be considered a cable service, subject to local franchising requirements, including the payment of franchise fees. This regulatory certainty benefited the cable system operator, as well as the local government and ultimately the subscriber. Under this regulatory environment cable modem service flourished, making it the dominant leader in high

[42] Nielson/NetRatings, Jan. 2001.

speed Internet access. Cable system providers pass more homes, have a greater penetration rate and have more subscribers than any other high speed Internet access medium all accomplished under the existing system. The only entities to benefit by the Commission's Declaratory Ruling are the cable companies, and that "benefit" is a federal gift of millions of dollars a year of public property.

The regulatory certainty has also benefited local governments. Local governments received increases on franchise fee revenue as a result of cable modem service sales. The LFAs estimate that they will collectively stand to lose $1,800,000.00 this year if franchise fees cannot be collected in cable modem revenues.[44] Since the Commission expects cable modem service subscribership to increase 40% over the next two years, it is reasonable for the LFAs to estimate that they will collectively lose $2,525,400.00 per year in franchise fees by 2004. Assuming that subscribers and revenues remain static over a 15-year franchise period, the LFAs will collectively lose (and the cable companies will "pocket") approximately $37,881,000.00 over a fifteen-year franchise period in franchise fees. In all likelihood, subscribers and revenues would increase making the loss to just the filing LFAs more likely to be in excess of $50,000,000.00.

Subscribers have benefited from the rapid roll out and availability of cable modem

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[43] Nielson/NetRatings, Broadband Audience surpasses 21 Million in November Setting a Record High According to Nielson/NetRatings, December 11, 2001. Press release can be found at http://www.nielsen-netratings.com/pr/pr_011211.pdf

[44] The Metropolitan Government of the City of Nashville and Davidson County estimates $510,000.00; the City of Oklahoma City estimates $384,000.00; the City of Minneapolis estimates $200,000.00; the Ramsey Washington Counties Suburban Cable Commission estimates $127,500.00; the North Suburban Cable Commission estimates $125,000.00; the Sherburne Wright County Cable Commission estimates $100,000.00; the South Washington County Telecommunications Commission estimates $130,000.00; the City of Urbandale, Iowa estimates $44,300.00; the North Metro Telecommunications Commission estimates $6,500.00 (on 800 subscribers of one-way cable modem service subscribers).

services under a dual regulatory scheme. They also benefited from having local government maintaining regulatory authority over cable modem service in the form of customer service standards, the local handling of customer complaints and some local accountability for cable modem rates. Moreover, it is clear that while the dual regulatory scheme under Title VI helped to some extent to hold cable companies accountable for rate increases, the Declaratory Ruling releasing cable modem services to a virtual unregulated environment immediately produced astonishing cable modem service rate increases. It is not mere coincidence that shortly after the Commission's Declaratory Ruling, AT&T Broadband announced that it will increase rates $7.00 (approximately 18%) and increased rates on subscribers that own cable modems in a disproportionate amount as contrasted to subscribers that rent cable modems from AT&T Broadband.[45] If cable modem service fees continue to escalate at this pace it will create a national environment of information "haves and have nots."

If the Commission assumed that the elimination of franchise fees on cable modem service would result in the passing on of these multimillion dollar savings to consumers, the Commission was wrong. The largest cable company in the United States pocketed the millions of dollars and proceeded to raise cable modem service rates at an astonishing level.

While subscribers and local governments have expressed their outrage, under the new regulatory uncertainty created by the Declaratory Ruling it is unclear how subscriber complaints are even to be handled. This is particularly disturbing because in many if not all cases the cable system operator has a monopoly in cable modem service and high speed Internet service.

The Commission has asked local governments to continue to address customer service

[45] *See Modem Owners Furious at AT&T Price Hike,* Boston Globe, June 9, 2002.

standards, while taking away any authorization to do it and taking away the fees to pay for the added local burden. The LFAs estimate that they continue to receive complaints on the same proportion as cable television complaints. All of the LFAs have received numerous complaints on cable modem services. Customers are accustomed to submitting complaints to the LFAs on matters that relate to the cable operator and local governments are best equipped to address such complaints. The Metropolitan Government of the City of Nashville and Davidson County, for example, has been forwarded complaints on cable modem service by not only the Commission, but also the Tennessee Consumer Services Division of the Tennessee Regulatory Authority. Complaints range from outages to customer service to billing.

## IV. THE COMMISION SHOULD ADOPT RULES FOR INFORMATION SERVICES THAT ARE CONSISTANT WITH THE REGULATION OF CABLE SERVICES TO MAINTAIN THE REGULATORY CERTAINTY WHICH LED TO CABLE MODEM SERVICES AS THE PREEMINENT MEDIUM FOR HIGH SPEED INTERNET ACCESS.

In general, cable system operators do not have the right to provide additional services under their current local franchises.[46] The addition of cable modem service to traditional cable television service is analogous to the offering of telephone services by the telegraph companies in the late 1890s and early 1900s. In 1907, the Tennessee Supreme Court, relying primarily on the United States Supreme Court decision of *Richmond v. Southern Bell Tel. Co.*, 174 U.S. 761 (1899), held that a telephone company did not have the same rights and privileges under a Tennessee statute as those granted to a telegraph company.[47] The Court noted that the telephone

[46] However, as shown below, the Commission should adopt temporary rules allowing cable modem service providers to continue to act under their existing franchises for a sufficient period of time in order for a new franchise or modified cable franchise to be executed and for the Commission to develop its rules for cable modem service.

[47] *Home Tel. Co. v. Mayor of Nashville*, 101 S.W. 770 (Tenn. 1907).

industry imposes additional burdens and difficulties compared to a telegraph business in using city streets. In 1971, the Fifth Circuit stated in dicta that cable television service was not incidental to providing telephone service.[48] This decision indicates that in the absence of specific language to the contrary, cable franchises have not granted cable system operators the authority to operate new services, like Information services, irrespective of any additional burden on the public rights-of-way.[49]

Similarly, the District of Columbia Circuit in *National Cable Television Ass'n v. FCC*,[50] upheld the FCC's determination that video dialtone (now known as open video systems) service was not a cable service under the Cable Act and therefore did not need a cable franchise under federal law (separate and distinct from state and local law), because the video dialtone rules did not create a federally mandated franchise. However, the Court did not hold that a state or local government was somehow preempted from requiring a local franchise from a video dialtone provider under applicable state or local law. The Court noted that one of the purposes of the 1984 Cable Act was to preserve the local franchising system.[51] This was later codified in the Open Video System provisions in the 1996 Telecommunications Act and clarified in *City of Dallas v. FCC*.[52]

Although the Commission has found Cable Modem Service to be an Information service, there are several instances of "regulatory fit" between Information Services and Title VI, which

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[48] *General Tel. Co. v. FCC*, 449 F.2d 846. 855 (5th Cir. 1971).
[49] Clarence A. West, *The Information Highway Must Pay Its Way Through Cities: A Discussion of the Authority of State and Local Governments to be Compensated for the Use of Public Right-of-Way*, 1 Mich. Telecom. Tech. L. Rev. 29, 38 (1995).
[50] 33 F.3d 66 (D.C. Cir. 1994).
[51] Id. at 69.

would provide regulatory certainty on a number of important issues.[53] In fact, "[t]he regulatory model for cable services presents a particularly intriguing model in terms of current and future integrated digital communications offerings."[54] "Among other benefits, bringing cable Internet-based services under the cable framework would provide the industry desired regulatory stability at the most fundamental level."[55] We should also make it clear that we are not advocating for the regulation of Internet content by local governments, but rather standards for the provision of high speed data services.

In order to bring regulatory certainty back to cable modem services and to most efficiently carry out the Commission's goals, the Commission should adopt rules consistent with the regulatory certainty under Title VI, as shown below:

**Scope of Local Cable Franchises** – As we have noted above, many LFAs have provided for the provision of cable modem services in their existing cable franchises. Many of these franchises have been recently renewed and relied upon the cable modem services being regulated as cable services. The Commission should allow the regulation of cable modem services through existing cable franchises, so long as the regulations are consistent with the new rules of the Commission, if any, relating to Information services. Current franchises already address right-of-way management issues, such as engineering standards, critical customer service standards, prohibitions against economic redlining, prohibitions against discrimination, and enforcement standards. LFAs and Information Service providers should be given a reasonable period of time

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[52] 165 F.3d 341 (5th Cir. 1999) (court held the Commission exceeded its statutory authority in exempting OVS operators from franchise requirements).
[53] *See* Barbara Esbin, *Internet Over Cable: Defining the Future in Terms of the Past*, 7 CommLaw Conspectus 37, 113 (Winter 1999).
[54] *Id*. at 43.

to either amend their cable franchises, or to negotiate a new franchise with Information Service providers including the payment of fees for the occupation of public rights-of-way for these emerging services.

**Franchise Fees** – Cable modem service has thrived under Title VI, which capped franchise fees on cable services at 5%. To create regulatory certainty, the Commission should adopt rules consistent with the Cable Act, which caps franchise fees on information services at 5% of gross revenues. This model has already been proved successful and would immediately provide regulatory certainty for the cable industry and LFAs as well as compensate local franchising authorities for the occupation of rights-of-way. Additional monies are necessary to fund the added customer response burdens already emerging at the local level. Information service providers should be required to pay franchise fees based upon cable modem service to the date of the Declaratory Ruling, or the date the provider stopped paying franchise fees.

**Cross-Subsidy (Bundling)** – Most traditional cable system operators now offer, or will soon offer, traditional cable television, cable modem service, and telephony service. The Commission should implement a rule that prohibits the operators from "hiding" behind one of these services to avoid paying franchise fees on another of the services.

**Equipment – Equipment Compatibility and Navigational Devices.** Since cable modems are readily available in the marketplace, it would seem largely unnecessary to adopt rules concerning the equipment compatibility between cable modems and consumer electronics equipment and the commercial availability of cable modems. However, if the Commission finds that such rules would be important it could use the rules promulgated under Title VI to develop

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[55] *Id*. at 44.

such rules.[56]

**PEG Programming** – Perhaps one of the most important rules that the Commission could develop is the requirement of any franchised Information Service provider to provide cable modem service to the local government, the schools and libraries within a franchised territory. While the Universal Service Fund attempts to serve schools and libraries, it has had limited success. Many local franchising authorities, through their cable service franchises, have been able to require cable modem service to schools and libraries even though they have not had a specific dictate to do so – the cable model works.

The Internet has also become a way to bring communities together. High speed services allow subscribers to connect with their schools and libraries, to receive video streaming of important federal, state and local government meetings. The Commission will miss an enormous opportunity to encourage and enhance the benefits of good government by failing to provide for the PEG needs of subscribers.

**Rate Regulation** – Cable modem service is still in its infancy. As it stands today, Information service providers of cable modem services have a near *de facto* monopoly over the provision of high speed Internet service. The Commission has historically preferred to let market pressures dictate cable modem rates. However, it is not just a coincidence that as soon as it became questionable what regulatory model applied to Information Services, AT&T Broadband increased its rates by $7.00. So long as there is a monopoly on high speed data services, subscribers will be at the mercy of the provider. The increased pricing will not help advance the deployment of the services and their will be a broadening of the gap between the

[56] *See* Sections 624A and 629 of the Cable Act.

haves and have nots, which is contrary to Congress' stated policy of promoting the continued development of the Internet.[57] The Commission should concern itself with this emerging problem.

**Subscriber Privacy –** Subscribers need to be assured that their private will not be made public without their knowledge. Section 631 of the Cable Act provides a good model to protect subscriber privacy. Following the Declaratory ruling, it appears there is no protection for cable modem service subscribers. The Commission must address this issue.

**Regulatory Uncertainty.** There is emerging a number of different technologies using Internet Protocal (IP) technology, such as IP telephony and IP video. Open Video Systems for example use IP to deliver their signals over VDSL lines to subscribers. The Commission must address the regulatory status of these services immediately to provide regulatory certainty in the marketplace.

## V. CONCLUSION

As shown above, local governments receive authority to manage and collect fees for the use of their rights-of-way by private entities for profit from their state governments, rather than the federal government. Legal precedent dating back over one hundred years holds that the federal government has no authority to preempt such authority. For over thirty years, the Commission has recognized a dual regulatory policy over cable systems. Under this system, cable modem service has thrived, resulting in cable modem service becoming the dominate provider of high speed Internet service. The Commission must continue this dual regulatory policy to provide the regulatory certainty needed for the advancement of the Commission's goals

[57] *See* 47 U.S.C. § 230(b)(1).

relating to cable modem service.

Respectfully submitted,

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